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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. [redacted]65

TEODORA ARAN DE VILLANUEVA, APPELLANT,

vs.

MARIANO P. VILLANUEVA.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE APPELLANT.

C. W. O'BRIEN,
Manila, P. I., Attorney for the Appellant.

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APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE APPELLANT.

Statement of Facts.

This is an action for a divorce, or more properly a separation, by a woman against her husband under the Spanish law in force in the Philippine Islands. The wife charges her spouse with having committed adultery with six different women, by whom he had eleven illegitimate children, as alleged in paragraphs 3, 4, 5, 6, 7, and 8 of the complaint (Rec., 2, 3). The trial court, in its decision, found on pages 72, 73, and 74 of the record, has made a complete

statement of the case, to which reference is made, without reproducing it herein. The trial court held that the principal points have been so clearly and conclusively proven that there can be no doubt as to the facts which were the object of the proofs.

They were married in 1867 and lived together until 1902, when the wife left her husband and lived apart, except for occasional visits made to her home to see her children. About ten years previous to 1902 five of the illegitimate children had by one of the women were brought into the conjugal home and treated as members of the family. Before receiving these children into their home the defendant promised his wife that he would have nothing more to do with their mother (Rec., 11), but later broke this condition (Rec., 11, 12, 18). The children by the other women were kept at the home of his illegitimate daughter, who had married a doctor.

The defendant pleaded a general denial and, for the purpose of this appeal, two special defenses: first, that if the alleged acts were committed they were performed with the authority, knowledge, and consent of the plaintiff and have been condoned by her; second, that the action has prescribed (Rec., 6).

The trial court found that between the years 1868 and 1900 the defendant had committed adultery with Florencia Quijano, Quiteria Buenconsejo, and Vicenta Buenaflor, and had illegitimate children by each of them, but held that the acts of adultery charged with the other women were not proven.

The trial court refused to grant the plaintiff any relief and dismissed the case, for the reason that she lived with the defendant after the acts of adultery had been committed, and considered this fact sufficient to prove to the court that she had pardoned her husband only for all acts committed by him with Florencia Quijano prior to the year 1900; that she did not occupy the same bed as her husband, but that the defendant testified that he has not cohabited with any

woman since 1900, on account of his infirmity, and the court concludes that the pardon of the aggrieved party is a sufficient defense in divorce proceedings (Rec., 76), even though he broke the condition.

The court then proceeds to justify its holding on the ground that the plaintiff must have been unduly influenced to bring the action after so many years (Rec., 76, paragraph 9 of the decision).

In regard to the other acts of adultery proved at the trial the court held that so much time had elapsed since they were committed without the woman complaining of them, because she neither knew of them then nor knows of them now, and although they have been included in the complaint, that they are not sufficient cause for decreeing a divorce between the parties litigant.

The Supreme Court of the Phillipine Islands affirmed the lower court and materially changed the findings of fact found in paragraph 8 of the trial court's decision (Rec., 75 and 76), which found that the woman had not lived maritally with her husband for the past ten years, but, at the same time, she said she had lived temporarily in the house of the defendant in an accidental manner on several occasions. The Supreme Court held that during the seven or eight years succeeding 1900 there was no suspension of the conjugal life or any break in the harmony and that conciliation existed between the spouses.

The Supreme Court of the Philippine Islands further held (Rec., 91) that because the plaintiff only knew personally and had initiated this action on account of the defendant's acts of adultery with the first woman specified in the complaint, that, consequently, the allegations relative to her husband's adultery with five other women should have been stricken out of her complaint.

Assignment of Errors.

1. The Supreme Court of the Philippine Islands erred in holding that the appellant had condoned all acts of adultery of the defendant and appellee with Florencia Quijano.

2. The Supreme Court of the Philippine Islands erred in holding that the said acts of adultery of the defendant and appellee with Florencia Quijano were not ground for the granting of a divorce.

3. The Supreme Court of the Philippine Islands erred in holding that the adultery committed by the defendant and appellee with Quiteria Buenconsejo was not sufficient ground for divorce.

4. The Supreme Court of the Philippine Islands erred in holding that the adultery of the defendant and appellee with Vicenta Buenaflor was not sufficient ground for a divorce.

5. The Supreme Court of the Philippine Islands erred in weighing the motives which induced the plaintiff in bringing this action.

6. The Supreme Court of the Philippine Islands erred in holding that the adulterous acts complained of by the plaintiff in the above-entitled cause were too remote.

7. The Supreme Court of the Philippine Islands erred in finding that all the acts of adultery proved against the defendant and appellee were not sufficient to entitle the plaintiff and appellant to a divorce.

8. The Supreme Court of the Philippine Islands erred in holding that the findings of fact supported the judgment rendered by the trial court herein; and

9. The Supreme Court of the Philippine Islands erred in denying the appellant's motion for a rehearng.

ARGUMENT.

I. AND II.

The Supreme Court of the Philippine Islands erred in holding that the appellant had condoned all acts of adultery of the defendant and appellee with Florencia Quijano.

The Supreme Court of the Philippine Islands erred in holding that the said acts of adultery of the defendant and appellee with Florencia Quijano were not ground for the granting of a divorce.

As we have seen in our statement of facts, the defendant and appellee, between the years 1868 and 1900, lived in continuous adultery with one Florencia Quijano, as a result of which relationship certain children were born. Of this relationship the plaintiff and appellant had knowledge. The defendant and appellee also lived in adultery for a number of years prior to the year 1900 with one Quiteria Buenconsejo. Of this relationship plaintiff and appellant had no knowledge. The defendant and appellee also committed adultery with one Vicenta Buenaflor some years prior to the presenting of this action, as a result of which a daughter was born. Of this relationship plaintiff and appellant had no knowledge.

The only evidence of condonation to be found is that the plaintiff and appellant lived casually in the house of the defendant and appellee for a little time after her separation with him in the year 1900. It is our contention that the evidence is not sufficient to establish condonation such that the plaintiff is deprived of her action, for the following reasons:

1. The doctrine of condonation is not applied so strictly to the wife as to the husband.

2. Condonation does not embrace all the acts of the offending party, but only the acts of which the condoning party had knowledge at the time thereof.

The authorities all hold that condonation is not so easily inferred and is not so strict a bar against the wife as against the husband. The reason for this is apparent. The wife is usually utterly dependent upon the husband and greatly under his control. It is not easy for her to sever the domestic ties that bind her to the husband's household, thereby giving up her home and means of support. She may continue to live with her unfaithful husband, knowing his unfaithfulness and not thereby condoning the same by sheer force of necessity. As Lord Stowell, in the case of D'Aguilar *vs.* D'Aguilar, 1 Hag. Ec., 773, 786, said:

> "A woman has not the same control over her husband, has not the same guard over his honor, has not the same means to enforce the matrimonial vow; his guilt is not of the same consequence to her; therefore the rule of condonation is held more laxly against the wife."

In Beeby *vs.* Beeby, 1 Hag. Ec., 789:

> "She may find a difficulty either in quitting his house or withdrawing from his bed. The husband, on the other hand, cannot be compelled to the bed of his wife; a woman may submit to necessity."
>
> See Bishop on Marriage, Divorce, and Separation, sec. 284, and cases cited.

On the second point the authorities are uniform. In the very nature of things one cannot forgive an unknown injury. The result is that a matrimonial offense of which the offended party had no knowledge continues to subsist as to such offense with all the rights flowing therefrom vested in the offended party, notwithstanding the fact that another offense of which the offended party has knowledge has been condoned. Condonation is a voluntary act and cannot be held to embrace more acts than the condoning party intended.

The forgiveness of one act does not bar divorce for another.

Ralston *vs.* Ralston, 8 Scotch. Sess. Cas., 4th ser., 371.

It is also held that a general condonation of cohabitation extends simply to what the condoning party knew.

Alexandre *vs.* Alexandre, Law Rep., 2 P. M., 164.

Indeed, it is intimated that an implied condonation by one knowing only a part does not so much as cover the part. It is perfectly apparent that one might condone a single act "committed under mitigating circumstances, yet not more, much less a series of offenses." See Bishop on Marriage, Divorce, and Separation, sec. 299, and cases cited, as follows:

Note 5, D'Aguilar *vs.* D'Auguilar, 1 Hag. Ec., 773; 3 Eng. Ec., 329, 337; Durant *vs.* Durant, 1 Hag. Ec., 733; 3 Eng. Ec., 310; Turton *vs.* Turton, 3 Hag. Ec., 338; 5 Eng. Ec., 130, 136; Bramwell *vs.* Bramwell, 3 Hag. Ec., 618; 5 Eng. Ec., 232, 238; Odom *vs.* Odom, 36 Ga., 286; Clouser *vs.* Clapper, 59 Ind., 548; Verholf *vs.* Van Houwenlengen, 21 Iowa, 429.

The same principle is expressed in the Spanish law in the preamble to the law of civil marriage of the 18th of June, 1870, under the heading "Divorce—Causes and Effect." Under this heading it is stated:

> "Article 87 of the project (85 of the law), in which are defined the causes giving rise to divorce, is based upon this same principle. The generating principle of all is the same that inspired the ecclesiastical jurisprudence, which is most jealous of the perpetual and continuous union of the spouses. The woman's adultery, or the same crime committed by the husband, if at the same time he abandons his wife or humiliates her to the point of taking his mistress in the conjugal house, makes possible the divorce, *unless these grave offenses shall have been tacitly or expressly forgiven by the innocent spouse.*"

This law, with the exception of articles 44 to 78 thereof, was never extended to the Philippine Islands.

The law governing divorce for adultery and the condonation of such offenses is to be found in the "Partidas."

Benedicto *vs.* De la Rama, 3 Phil. Rep., 34; 201 U. S., 303.

By law 6, title 9, partida IV, the husband's pardon is made a part of a suit for divorce on the ground of his wife's adultery.

In view of the foregoing we submit that there was insufficient evidence before the court to justify its finding that the acts of the defendant and appellee committed with Florencia Quijano had been condoned, or that any such condonation as there might have been was sufficient to purge the defendant and appellee of all guilt flowing from his unknown acts of adultery.

The court found that from the year 1900 to the present time the appellee was seen on various occasions with his mistress, Florencia Quijano, and that on these occasions he treated her with marked attention, though there was no proof of adultery at that time. We submit, however, that if the offending husband, while enjoying a conditional forgiveness for adultery with a woman, continues to flaunt that woman before the eyes of his wife in public places, the condonation or conditional forgiveness is withdrawn and the injured wife still has her action at law, even though no further act of adultery is proved.

All condonation, especially the implied condonation, is upon the condition that continually thereafter the party forgiven shall treat the other with conjugal kindness; "whereupon a breach of the condition revives the original right of divorce." Bishop on Marriage, Divorce, and Separation, sec. 308, and cases cited. See also secs. 311, 312, and 313 of the same author, and cases cited. We submit, therefore, that the Supreme Court of the Philippine Islands erred in holding that an effective condonation of the adultery of

the defendant and appellee with Florencia Quijano existed at the time of the trial such as to constitute a bar to her action for divorce.

III.

The Supreme Court of the Philippine Islands erred in holding that the adultery committed by the defendant and appellee with Quiteria Buenconsejo was not sufficient ground for divorce.

The trial court found that the defendant and appellee's adultery with Quiteria Buenconsejo was unknown to the plaintiff and appellant. That adultery is ground for divorce within the Philippine Islands requires no argument. We have here, then, a case of uncondoned adultery on the part of the defendant and appellee. The trial court held that the plaintiff and appellant had condoned the defendant and appellee's adultery with Florencia Quijano, and that this condonation extended to the adultery of Quiteria Buenconsejo, of which she had no knowledge. That this position is untenable is demonstrated by the authorities we have already cited under the foregoing assignment of error. There can be no condonation of an unknown act. Therefore we submit that the court erred in holding that the adultery committed by the appellee with Quiteria Buenconsejo was not sufficient ground for divorce.

IV.

The Supreme Court of the Philippine Islands erred in holding that the adultery of the defendant and appellee with Vicenta Buenaflor was not sufficient ground for a divorce.

The reasoning of the trial court with regard to the acts of adultery committed by the appellee with Vicenta Buenaflor are subject to the same criticism as that indicated under

the foregoing assignment of error. We will not duplicate argument thereon.

V.

The Supreme Court of the Philippine Islands erred in weighing the motives which induced the plaintiff in bringing this action.

We submit that the court has no right to inquire into the motives for the bringing of an action if the right of action exists under the law. The right of action cannot be made to depend upon the motives of the person by whom it is exercised. We therefore submit that the trial court erred in ruling that the motives of the plaintiff and appellant in bringing this action were sufficient to defeat the bringing of the action.

VI.

The Supreme Court of the Philippine Islands erred in holding that the adulterous acts complained of by the plaintiff in the above-entitled cause were too remote.

We do not understand the ruling of the trial court in holding that the defendant's acts of adultery were too remote in point of time. There is no law of prescription for separation (art. 1961 *et al.*, Civil Code). The plaintiff had a right to exercise her action and to receive a decree in the absence of a showing of full condonation with subsequent conjugal kindness on the part of the defendant. We therefore submit that the trial court erred in finding that the adulterous acts complained of were too remote.

VII.

The Supreme Court of the Philippine Islands erred in finding that all the acts of adultery proved against the defendant and appellee were not sufficient to entitle the plaintiff and appellant to a divorce.

An examination of the record will disclose that the defendant and appellee lived in continuous adultery during almost his entire married life, and that his acts of adultery were not confined to a single woman, but were committed with three different women, as a result of which he has three families of children.

The children by the first woman were received into the family on the express condition that the defendant would repent, cease to devote his attention to the mother of them, and, of course, treat his wife with conjugal kindness. He broke each of these express conditions (Rec., 11). In 1900 the husband went to Spain and the wife went to live with her daughter at Virac, on the Island of Catanduanes, lying off the shore from the province where they resided. Upon his return to the town of Tabaco the wife came from Virac and found that he had resumed his relations with Florencia Quijano. The husband made frequent trips to the town of Legaspi, going every Saturday (Rec., 12). He treated his wife as a servant. She could no longer remain in the home. Her children had grown up and married, and were living apart; so she made long visits first to one, then another, until in 1910 she returned home on the celebration of the birthday of her daughter, the youngest child by her husband, and remained over night (Rec., 18). This demonstrates that she did not forgive her husband; neither did she renew her conjugal life with him.

Greenleaf on Evidence, vol. II, sec. 53, states that:

> "Condonation is forgiveness with an implied condition that the injury will not be repeated and that

> the party shall be treated with conjugal kindness; and on breach of this condition the right to remedy for former injury revives."

This principle is frequently quoted with approval by our State courts (Fisher *vs.* Fisher, 93 Md., 298). Acts of adultery are revived by failure to treat the party with conjugal kindness and by acts of impropriety tending toward but falling short of the repetition of the offense (Davis *vs.* Davis, 19 Ill., 334; Moorhouse *vs.* Moorhouse, 90 Ill. App., 401; Fisher *vs.* Fisher, 93 Md., 298; 48 Atl., 833; Timerson *vs.* Timerson, 2 How. Pr. N. S., 526; Johnson *vs.* Johnson, 14 Wend., 637 (*reversing* 4 Paige, 460 (*reversing* 1 Edw., 439)) *quære;* Langdon *vs.* Langdon, 25 Vt.,678; 60 Am. Dec., 296; Durant *vs.* Durant, 1 Hagg. Eccl., 733; 3 Eng. Eccl., 310; Cooke *vs.* Cooke, 9 Jur. N. S., 754; 32 L. J. P. & M., 154; 8 L. T. Rep. N. S., 644; 3 Swab. & Tr., 126; 11 Wkly. Rep., 957; Dent *vs.* Dent, 34 L. J. P. & M., 118; 13 L. T. Rep. N. S., 252; 4 Swab. & Tr., 105; Winscom *vs.* Winscom, 10 Jur. N. S., 321; 33 L. J. P. & M., 45; 3 Swab. & Tr., 380; 10 L. T. Rep. N. S., 100; 12 Wkly. Rep., 535; Ridgway v. Ridgway, 29 Wkly. Rep., 612. *Contra* Collins *vs.* Collins, 9 App. Cas., 205; 32 Wkly. Rep., 500).

The defendant treated his wife as a servant when she was in his home. He continued his attentions to Florencia Quijano, and was often seen going into her home at night and leaving there early in the morning (Rec., 31, 32, and 33). Hence, it is presumed that he went there to renew his adulterous relations with this woman. The opportunity and the occasion accompanied, as he himself admits, with the desire, were present, and at least the court must conclude that these were improprieties tending towards a repetition of the offense which would revive his former acts of adultery.

It was certainly disrespectful to, and a mistreatment of, his wife. Both the trial court and the Supreme Court of the Philippine Islands failed to properly consider this phase of the question. The evidence of the defendant in this case

is similar to some of the evidence in the case of De la Rama *vs.* De la Rama, which, upon considering, this court made some very pertinent remarks in regard to its credibility. It is hard to conceive for what purpose the defendant would go to the house of a woman and remain over night with her unless it would be for a repetition of his adulterous acts, and we believe that for this alone his evidence and the evidence of his son-in-law, who testified as a physician, should be disregarded. But even admitting that what he stated were true, the plaintiff contends that he has revived all his former acts and offenses by his future acts of impropriety.

This case was tried in March, 1911. The plaintiff testified (Rec., 21) that she ceased to have marital relations with her husband approximately thirteen years previous to that time. From the fact that she occasionally returned to her home to visit her children who still resided therein, it shall not be presumed that the parties were living together as man and wife or that they resumed marital relations (Harnett *vs.* Harnett, 59 Iowa, 401; 13 N. W., 408; Toulson *vs.* Toulson, 93 Md., 754; 50 Atl., 401; Hann *vs.* Hann, 58 N. J. Eq., 211; 42 Atl., 564. *Contra*, Marsh *vs.* Marsh, 13 N. J. Eq., 281).

Few of the older women in the Philippine Islands are educated, and when the plaintiff stated that she knew of no other offenses committed by her husband, as the Spanish text will show, she meant that she did not know personally of his misconduct (Rec., 18, 19, and 91). But there is no logical reason why his offenses committed with these other women should not be taken into consideration, and a decree granted by reason of those acts in connection with those committed with the other woman.

The Supreme Court of the Philippine Islands attempts to justify a change in the findings of the trial court by quoting a page of the plaintiff's testimony (Rec., 89).

An examination of the record will show that the findings of the trial judge are based upon a preponderance of the evidence and that the change by the Supreme Court is based

upon a disconnected answer. There is no evidence to support the finding that for seven or eight years succeeding the year 1900 there was no suspension of conjugal life or any break in the harmony or that conciliation existed between both spouses (Rec., 90). There is no evidence to support the finding (Rec., 91) that plaintiff condoned all the acts of adultery committed by the defendant from 1868 to 1910, and even admitting that she agreed to condone those known to her it was not only implied, but expressly agreed, that the husband would treat her with conjugal kindness, which he failed to do, and treated her as a servant and committed also acts of impropriety, which revived all those former adulterous acts. When a man in the night frequents the house of his former concubine, with whom it is admitted he had children, it is quite sufficient to be a "dissipation that violates the conjugal felicity" (Rec., 93) of his wife.

The Supreme Court of the Philippine Islands in a way attempts to apply the articles of the Criminal Code to this action. This is purely a civil action and is governed by the Civil Code. No mention is made of the prescription of actions for divorce in title 18, chapter III of the Civil Code.

In the case of Cass *vs.* Cass, 34 L. A., 611, it is held that a renewal of acts of ill treatment or public defamation will renew and corroborate a new action. Generally the cases reported in ecclesiastical reports held the same way. The law applicable to this case is set out in the case of De la Rama, 3 P. I. Rep., 334, and is found in the Partidas. It is true that only spouses can exercise the action for divorce against each other, but this does not limit them to their personal knowledge of acts committed by the other. Either can call such witnesses as may be necessary to establish any allegations contained in the complaint. The Spanish Government derived their laws from the old papal decrees, and compiled and brought them down to date from various Latin sources, and published them as early as 1585 in what is known as Las Partidas. The ecclesiastical courts derive their laws from the same source, and a holding of those

courts is very applicable in the present case. Criminal as well as civil procedure, and also statutes governing prescription, were adopted in the Philippine Islands and are still in force, unless expressly repealed by some act of the Philippine Commission or legislature since American occupation. The Partidas provide for the procedure in conducting actions for a separation, but it is contended that none of this procedure is in force at the present time.

When the wife forgave the husband for the offenses which he had committed against the chastity of her home, it was upon express condition, which he violated and wholly disregarded from the time he brought his illegitimate children into her home until the beginning of this action. He failed to treat her with conjugal kindness. She could not bear to remain in the home and dwell with his illegitimate children and be treated as a servant; and from the year 1900 up to 1910, when this action was begun, only visited her home on rare occasions. The husband is now enjoying the company of his illegitimate children and his home, and visiting, as often as he desires, the homes of his concubines, while his wife is wandering about among her children who have married and are residing away. The fact that age and infirmity has made it impossible for the husband to commit the same offenses as he formerly did should not prevent the mother of his ten children, who is compelled to reside away from her home, from obtaining some of the benefits and enjoyment of the property which has accumulated to them. It is an erroneous decision that would compel her to live upon the charity of her children, apart from her husband and home, and allow him to make various trips to foreign countries in company with his illegitimate children and to enjoy their society in the conjugal home. The fact that the wife has been rather tardy in bringing this action is no reason why she should be compelled to longer submit to the indignities placed upon her by her husband. It takes a lot of nerve for a woman in a Catholic country to break up her home and commence a litigation against her husband for

a separation and division of their property. The sanctity of the home is far greater among the Spanish people than it is among the English. Must this woman continue to suffer the indignity placed upon her by the acts of her husband and submit to the companiation of him and his illegitimate children in her home should she decide to return to it or be denied all relief in this action?

It is, therefore, respectfully submitted that the Supreme Court of the Philippine Islands seriously erred in denying this woman a decree.

VIII AND IX.

The Supreme Court of the Philippine Islands erred in holding that the findings of fact supported the judgment rendered by the trial court herein.

The Supreme Court of the Philippine Islands erred in denying the appellant's motion for a rehearing.

These assignments of error are supported by the foregoing arguments. Therefore the appellant respectfully submits that the decision of the Supreme Court of the Philippine Islands should be reversed and that she be granted a decree of separation and a division of the community property with costs.

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Attorney for Plaintiff and Appellant.

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No. 352 65

TEODORA ARAN DE VILLANUAVA, APPELLANT,
vs.
MARIANO P. VILLANUEVA.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

APPELLANTS ADDITIONAL MEMORANDUM.

Credibility of party charged with adultery.

Harrington *vs.* Harrington, 116 Mass., 761.
Stickle *vs.* Stickle, 48 N. J. Eq., 336.
Whitenack *vs.* Whitenack, 36 N. J. Eq., 474.
Astley *vs.* Astley, 1 Hagg. Ecc., 714, 720, 721.

DELAY, CONDONATION AND REVIVAL.

Armstrong *vs.* Armstrong, 32 Miss., 279.
Guthrie *vs.* Guthrie, 26 Mo. app., 566.
Ferrers *vs.* Ferrers, 1 Hagg. Con., 130.
Wessels *vs.* Wessels, 28 Ill. app., 253.
Farnham *vs.* Farnham, 73 Ill., 497.
Sharp *vs.* Sharp, 116, Ill., 509
Duberstein *vs.* Duberstein, 171 Ill., 133.
Todd *vs.* Todd, N. J. Eq. 1897 att. Rep. 766.
Sections 312, 319, and 320, Bishop on M. & D., Vol. 2.
Diaz *vs.* Torrez, 17 Porto Rico, 476.
Durant *vs.* Durant, 1 Hagg, Ecc., 733.
D'Aguilar *vs.* D'Aguilar, 1 Hagg. Ecc., 773.

Williard's Notes on the Spanish Civil Code, p. 14 to p. 20.

See Weyler's order leaving in force former legislation for Titles (civil not criminal) hereby suspended.

JURISDICTION.

Rector *vs.* Lipscomb, 141 U. S., 557.
Micas *vs.* Williams, 104 U. S., 556, Sec. 10 Act of Cong., July 1, 1902.
De la Rama *vs.* De la Rama, 201 U. S., 303.

REEXAMINATION OF FACTS.

Beyer *vs.* Lefevre, 186 U. S., 114, and cases cited in De la Rama supra.

THE PARTIDAS.

Separation for adultery is provided for in Book 4, Title 2, Law 3; Jurisdiction, in the Ecclesiastical Court, Book 1, Title 6, Law 58; also Title. 10, Law 1, and Title 9, Law 2, and is now conferred on the civil court by Act 136, Sec. 56, of the Philippines. Book 4, Title 9, Law 9, mentions the two ways in which accusations may be made in order to "departir el matramonio," i. e., an action in the Ecc. Court and one for punishment in the Lay Court; Title 10, Law 1, defines divorce; Title 10, Law 6, provides for a waiver even after judgment has been given; Laws 15 to 20 provide for witnesses; Law 6 of this Title and Book mentions several defenses on the part of the wife, among which is pardon or condonation, but nothing is said about these applying to the husband, although Title 9, Law 2, provides for the accusation by either against the other.

Ecclesiastical courts have no authority to execute on property without the intervention of the lay court. Novisima Recopilacion, Book 2, Title 1. Under "Divorcio" in the index to the Partidas 4 Vol. 50, no mention is made of prescription or of Book Seven, the criminal law.

Criminal Law Book 7 of the Partidas.

Title 17 Law 1 of this Book defines adultery;

Title 17 Law 4 fixes the limitation for accusations for adultery at 5 years, but if done by force at 30 years; Title 17 Law

15 states the penalties; and other titles and laws of this book treat of crimes, witnesses, procedure, etc., *all in the Lay Court;* Title 17 Law 13 permits the husband to charge the wife in the Lay court, but not the wife, the husband.

ON ERRONEOUS FINDINGS.

Children entered home "in successive years."—Decision, p. 89, at end of first paragraph. This is contrary to evidence on p. 20, above the middle, and at the bottom of p. 25 and top of pp. 26 and 29.

That the daughter by another woman entered the conjugal home with the consent of the wife, bore husband's name and was treated publicly or otherwise same as legitimate children (p. 90, middle of page), is contrary to the evidence on top of p. 15; bottom of p. 28 and top of p. 29; top of p. 41; and below middle of p. 57. "That the wife continued to reside in the conjugal domicile until a little more than a year prior to filing her complaint," Decision p. 90, paragraph 3, is contrary to trial court's findings at bottom of p. 75 and top of p. 76, and the evidence near the bottom of pp. 15 and 20, below middle of p. 18 and above the middle of p. 19, and in the same paragraph, the finding, "It is true that during the seven or eight succeeding years there was no suspension of the conjugal life, or any break in the harmony or at least conciliation existing between both spouses," is absolutely contrary to all the evidence, see p. 18 entire; above the middle of p. 19; toward the bottom of p. 20; top pp. 21 and 29; and bottom of p. 41.

Last paragraph Decision p. 91, applying Partida 7, and the judicial principle, etc., of Penal Code, and stating reasons why lower court dismissed action is legally wrong and incorrect in fact. The criminal law is inapplicable and the trial court only found pardon up to 1900, not up to 1908,—top p. 76; error re daughter by second woman previously cited.

Last sentence on p. 92 and top of p. 93 is very erroneous as shown by previous citations. This daughter, as trial court found, paragraph 5, p. 75, that mother died after American

occupation, and at time of trial was not living in conjugal home, did not come into the home until about 1903, see top of pp. 29 and 41. When the plaintiff returned to visit her only single daughter, "she never entered their room; they did not invite her to eat nor did she sit down to the table" (p. 41, bottom). "My husband and I never spoke, although we were at the table" (p. 18, first answer). "I could not have my way in the house; I lived in it as though I was a servant" (p. 18 at the bottom).

The third (3) finding and conclusion of the trial court, p. 74, and the appellant's concurrence therein on p. 93 is contrary to the evidence. In 1902, on her return from Virac to Tobaco, p. 14, the wife says, "I found they again resumed their relations, also left house, "on acount of this woman." Maria Lopez testifies, p. 31, that in the last 5 or 6 years previous to the trial, "He only went there occasionally," "at sundown;" "left Florencia's house in her company," bottom of p. 32; "I have seen him leaving the house very early, when it was still dark," p 33, above middle. After Americans' occupation, when defendant returned to Tobaco, Bernabe Ranches, an employee, testifies, that defendant went to Florencia's house "after eight o'clock"—"one night," bottom of p. 35, saw him visit Quiteria Buenconsejo's house, top of p. 36. Another witness, top of p. 37, testifies to seeing defendant in house of Florencia at 8 A. M., alone with her; also witness on middle of page 84 states that defendant's relations with Quiteria Buenconsejo continued until 1904.

Respectfully submitted, by permission of this Honorable Court.

C. W. O'BRIEN,
Attorney for Appellant.

Washington, D. C., November 10, 1915.

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Supreme Court of the United States,

OCTOBER TERM.

No. 65.

TEODORA ARANA DE VILLANUEVA,
Appellant,

vs.

MARIANO P. VILLANUEVA.

BRIEF FOR APPELLEE.

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Supreme Court of the United States,

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No. 65.

TEODORA ARANA DE VILLANUEVA
Appellant

vs.

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BRIEF FOR APPELLEE

Statement

This is an appeal from a judgment of the Supreme Court of the Philippine Islands entered on March 17th, 1913, unanimously affirming a judgment of the Court of First Instance of Albay dated May 9th, 1911, dismissing the complaint herein. The action was brought by the appellant as plaintiff for a divorce from her husband, the appellee, on the ground of adultery, and for a liquidation of the property belonging to the conjugal partnership. The answer was a general denial. The defendant further pleaded condonation and prescription. In regard to the conjugal property, the plaintiff alleged that its "value

amounts to a considerable sum calculated at 300,000 pesos" (Rec. p. 4). This allegation was included in defendant's general denial and the defendant also pleaded that he was involved in litigation "which if decided against him will amount to a sum in excess of all his property" (Rec. p. 6).

The facts are fully set forth in the opinion of the Trial Court (Rec. pp. 72-77) and of Mr. Chief Justice Arellano of the Philippine Supreme Court (Rec. pp. 88-93). The appellant does not seriously question the correctness of the Court's findings on any of the essential facts of the case.

The most significant facts are as follows: The plaintiff (appellant) and defendant were married on July 11, 1867. The defendant was then 26 years old. He was at the time *in articulo mortis*, and the marriage was performed for the express purpose of legitimatizing issue (see marriage certificate, Rec. p. 78). The couple had eleven children, nine of whom are living, and who are all adult (Rec. p. 88). The defendant, whose vigor appears to have been physical rather than moral, wandered from the paths of domestic virtue at a very early stage of his married life. With the evident knowledge and toleration of his wife, he proceeded to raise several sets of illegitimate children, some of whom he brought up together with the children whom his marriage to the plaintiff had been made to legitimatize.

From 1868 to 1900, he openly maintained relations with one Florencia Quijano, by whom he had five children. The Court found that there was no proof of any acts of adultery with this woman after 1900, and that from that date defendant was incapable of sexual intercourse (Rec.

pp. 74, 75, 93). The plaintiff knew of these relations with Florencia, but, as she herself testified, "put up with them so as not to cause a public scandal" (Rec. p. 12). These offences were thus expressly condoned and the condonation was further evidenced by the fact that the children of this union were brought up under the family name and in the conjugal home (Rec. p. 90).

The Trial Court found that prior to 1900 the defendant also maintained relations with one Quiteria Buenconsejo, and at about the same time with one Vicenta Buenaflor, by both of whom he had children, but, as pointed out by the Philippine Supreme Court, any cause of action which may have been alleged on account of these offences was expressly eliminated by the plaintiff herself upon the trial, when she testified that she brought the suit solely on account of defendant's acts of adultery with Florencia Quijano (Rec. p. 91, also pp. 18-20).

The plaintiff and defendant continued to live together as man and wife until 1909, nine years after the latest date of any acts of adultery of which there is any evidence (Rec. pp. 74, 90), thus completing the condonation and permitting prescription to run against all the causes of action alleged.

Upon these facts the Trial Court properly dismissed the complaint, and the Philippine Supreme Court affirmed it both on the law and on the facts.

Brief of the Argument.

1. It is not shown that the jurisdictional amount is involved and this Court has therefore no jurisdiction.

2. This Court will follow the Courts below on questions of local law and will not review the concurrent findings of fact of the Courts below unless they are manifestly contrary to the evidence. In this case the findings were amply supported by the evidence.

3. The plaintiff had condoned the offences of which she complains.

4. Plaintiff's cause of action, if any, was long since barred by prescription.

POINTS.

I.

It is not shown that the jurisdictional amount is involved, and this Court has therefore no jurisdiction.

The appellant seeks to found the jurisdiction of this Court upon the amount claimed to be involved, but fails to make any sufficient proof of it. The complaint alleges that the value of conjugal property "amounts to a considerable sum, calculated at 300,000 pesos," and that its income is 18,000 pesos (Rec., p. 4). This was denied (Rec., p. 6). The complaint demands a partition and the adjudication to plaintiff of her share (Rec., p. 5), but states no facts from which the amount of her share can be estimated.

The only evidence on the subject of the amount of defendant's property was plaintiff's own testimony that the properties in Tabaco were large,

and "worth more than 20,000 pesos" (Rec., p. 15). The Court made no finding whatever on the subject. The affidavit of appellant (Rec., p. 101), submitted with the petition of appeal, simply follows the language of the statute, and is a mere conclusion. It does not show that she has any knowledge in regard to what property is involved, or is qualified to appraise its value. The defendant's uncontradicted testimony (Rec., p. 64) shows that he is burdened with various liabilities which will reduce the net amount of the conjugal property, and may wipe it out altogether.

For this Court to take jurisdiction of an appeal from a decree of the Philippine Supreme Court refusing a divorce, it must appear that the defeated party thereby loses an interest in the conjugal property, or an amount of alimony, in excess of $25,000. In de la Rama *v.* de la Rama, 201 U. S. 303, this appeared by the finding of the Trial Court. In this case it appears nowhere, except by plaintiff's perfunctory affidavit.

The burden of showing jurisdiction is on the appellant, and she must establish the jurisdictional facts "by a fair preponderance of testimony."

> See Wilson *v.* Blair, 119 U. S. 387.
> Johnson *v.* Wilkins, 116 U. S. 392.

Here there is a naked assertion and a flat denial, and no evidence on the trial of any value beyond 20,000 pesos.

While in some cases "where judgment goes for the defendant, the amount of the plaintiff's claim is the test of jurisdiction," nevertheless it must appear that the claim is made in good faith and upon substantial grounds.

> See Gorman *v.* Havird, 141 U. S. 206.

Here there is nothing before the Court from which the conclusion can be drawn that, if the conjugal property were partitioned, plaintiff's share would be in excess of $25,000 or any other sum. In her complaint plaintiff admits her inability even to describe the defendant's property (Rec., p. 4), and her testimony was so vague as to be valueless. The defendant testified as to his liabilities, but was not cross examined as to his resources.

The jurisdiction of this Court cannot be founded on mere conjecture, or on the appellant's unsupported and controverted assertion of a conclusion. In this case there is nothing more and the appeal should accordingly be dismissed for want of jurisdiction.

II.

(A.) This Court will follow the Courts below on questions of local law, and (B) will not review the concurrent findings of fact of the Courts below unless they are manifestly contrary to the evidence. In this case the findings were amply supported by the evidence.

(A.) The law governing divorce in the Philippines is the old Spanish law of the Partidas. How these ancient statutes are to be construed and applied is a question of local law, upon which this

Court customarily follows the ruling of the local Courts, unless they are "clearly wrong."

See Santa Fe Railway *vs.* Friday, 232 U. S., 694, at 700.
Nadal *vs.* May, 233 U. S. 447, at 454.
Ker *vs.* Couden, 223 U. S. 268, at 279.

In the case at bar, not one local or Spanish authority is cited against the rulings of the Courts below.

(B.) This Court will ~~even~~ also accept the findings of fact in which both Courts below have concurred, unless they are "clearly erroneous."

See Dun *vs.* Lumberman's Credit Assn., 209 U. S. 20, 24.
Shappirio *vs.* Goldberg, 192 U. S. 232, 240.

In the case at bar there was little or no real conflict of evidence. The defendant's adultery with Florencia Quijano and others prior to 1900 was proved, but the only evidence tending to show any offenses after that date was wholly insufficient to outweigh the evidence of sexual incapacity from and after 1900.

The appellant seeks to suggest a discrepancy between the rulings of the Trial Court and of the Philippine Supreme Court in regard to the date of the definite rupture between plaintiff and defendant, but there is none. The Trial Court found that the parties lived together as man and wife until 1909 (Rec. p. 74) and the Philippine Supreme Court found to the same effect (Rec. p. 90). The reference in Appellant's Brief (p. 3) to plaintiff's absence from the conjugal abode after 1900 is misleading. The Trial Court did not *find* that

the parties had not lived maritally for ten years, but merely stated that the plaintiff so testified (Rec. p. 75). The evidence showed actual cohabitation as late as January, 1910 (Rec. pp. 48, 49), and both Courts correctly held that this was sufficient, irrespective of the continuance of sexual intercourse.

Condonation is a fact, both Courts have found this fact upon amply sufficient evidence, and this Court should not be asked to reverse them upon mere inference or hypothesis.

III.

The plaintiff has condoned the offences of which she complains.

As pointed out by Mr. Chief Justice Arellano, it is sufficient to constitute condonation that the spouses "continued to live together in the same house" (Rec. p. 91). Part. 7, Tit. 17, Law 8, cited by the Court below, expressly provides that such continued cohabitation is sufficient evidence of forgiveness.

The evidence showed, and both Courts found, that the parties continued to live together until 1909. The latest acts of adultery of which there was any evidence were committed in or before 1900. The plaintiff does not even claim to have left her husband until 1902 (Rec. p. 3). Thus in any view of the case, condonation by cohabitation was fully established.

The numerous cases cited by appellant, in regard to conditional condonation, all arose in other

jurisdictions, under a different system of law, a different civilization and different moral standards. They are of no weight as against the conclusions of the Courts below concerning the law as actually in force in the Philippines.

The appellant argues that plaintiff did not know of the adulteries with Quiteria Buenconsejo and Vicenta Buenaflor and therefore could not have condoned them, but these, although found as facts by the Trial Court, were eliminated by the plaintiff herself (Rec. pp. 18, 19, 20), were held insufficient as grounds for a divorce by the Trial Court (Rec. p. 75), and were in effect stricken from the Record by the Philippine Supreme Court (Rec. p. 91). In any event these offences were barred by prescription, as will be shown in the next Point.

IV.

Plaintiff's cause of action, if any, was long since barred by prescription.

Part. 7, Tit. 17, Law 7, cited by the Court below, makes it a complete defence to a suit for divorce on the ground of adultery "that the adultery, of which complaint is made, was committed five years before the accusation is brought."

The bar takes effect, not five years from discovery, but five years from the fact itself.

Whatever right of action the plaintiff may have had must have ~~occurred~~ accrued prior to the enactment

of the Philippine Code of Civil Procedure, which took effect on September 1st, 1901. Such Code therefore does not apply (see §38), and the case is necessarily governed by the former Spanish law, as held by the Courts below. The acts of adultery of which there was any evidence were all in or prior to 1900 (Rec. pp. 74, 75), and the plaintiff waited *ten* years before bringing her action.

The provisions of the Civil Code relating to marriage and divorce (Title IV) are not applicable in the Philippine Islands (See Benedicto *vs.* de la Rama, 3 Phil. Rep. 34, 36-38). The right of action depending wholly on the ancient law, the bar of the ancient law necessarily applies also, and it is quite immaterial whether or not the Civil Code, as claimed by appellant, provides "no law of prescription for separation" (Applt's Brief, p. 10).

This absolute defense applies to the adulteries with Quiteria Buenconsejo and Vicenta Buenaflor, so that even if they are to be deemed open to consideration here, and not condoned, they are still of no avail to plaintiff.

It is manifestly in the interest of public decency that divorces should not be granted for long past offences, and that ancient scandals should be buried in oblivion. It is unnecessary in this case to defend or excuse the moral divagations of defendant, whether in his hot youth or his vigorous middle age. The Courts below were right in refusing to disrupt a marriage of over forty years standing on the ground of offences committed by the husband (now incapable of further offence) ten years before the suit was brought, and condoned by the wife by continued cohabitation for many years.

CONCLUSION.

The appeal should be dismissed for want of jurisdiction, or the judgment below affirmed.

Respectfully submitted this 8th day of November, 1915.

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Supreme Court of the United States,

OCTOBER TERM, 1915.

No. 65.

TEODORA ARANA DE VILLANUEVA,
Appellant,

vs.

MARIANO P. VILLANUEVA.

MEMORANDUM FOR APPELLEE IN REPLY TO APPELLANT'S ADDITIONAL MEMORANDUM.

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Supreme Court of the United States.

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No. 65.

TEODORA ARANA DE VILLANUEVA,
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Memorandum for Appellee in Reply to Appellant's Additional Memorandum.

The additional Memorandum submitted by Appellant by leave of Court has taken a somewhat wider range than counsel for the Appellee understood was contemplated. According to counsel's recollection of the colloquy on the subject, such additional Memorandum was to be directed entirely to the question of the applicability and effect of certain provisions of the ancient Spanish Law referred to by the Courts below. Since the Appellant's counsel has discussed other subjects also, Appellee's counsel deems it proper to reply briefly to Appellant's contentions in regard thereto.

I.—*Review of Facts.* Among the latest decisions of this Court to the effect that it will not review the concurrent findings of the two lower Courts "unless shown to be clearly erroneous" are the following:

Tex. & Pac. Ry. Co. *vs.* La. R. R. Com., 232 U. S. 338, 339;
Washington Sec. Co., *vs.* United States, 234 U. S. 76, 78;
Gilson *vs.* United States, 234 U. S. 380, 384.

Where there is evidence *tending to sustain* the findings of the Courts below, this is sufficient, and this Court will not weigh the comparative credibility of witnesses or review the conclusions drawn below from conflicting testimony.

In the case at bar there is evidence to sustain all of the findings made below and it is of no consequence that there was also some conflicting testimony given by or on behalf of the plaintiff. Moreover, the nature of the case is such as not to invite any unnecessary re-examination of the facts.

II.—*Jurisdiction.* The additional cases cited by Appellant's counsel do not sustain his contention that the mere affidavit of the Appellant stating, not facts, but a conclusion, is sufficient to show that the jurisdictional amount is involved. The rule is that upon the whole Record the jurisdictional value must be "made out by a preponderance of evidence."

See Red River Cattle Co. *vs.* Needham, 137 U. S. 632, 636.

The affidavit of a party which simply follows the language of the statute, without stating specific facts, is not sufficient.

> See Enriquez *vs.* Enriquez, 222 U. S. 123, 126;
> Enriquez *vs.* Enriquez, No. 2, 222 U. S. 127, 128.

The statute providing for the review of judgments of Territorial Supreme Courts contains the same provision in regard to the ascertainment of the jurisdictional amount, "by oath of either party or of other competent witnesses," as does the statute providing for the review of judgments of the Supreme Court of the Philippine Islands.

> See U. S. Rev. Stat. § 702; and 32 U. S. Stat., pp. 691, 695.

The decisions of this Court in regard to the manner in which the jurisdictional amount must be shown upon appeals from Territorial Supreme Courts are therefore equally applicable to appeals from the Supreme Court of the Philippine Islands.

III.—*Applicability of the Partidas.* As was demonstrated by the Philippine Supreme Court in Benedicto *vs.* de la Rama, 3 Phil. Rep. 34, the Partidas furnish the only divorce law which can be regarded as being in effect in the Philippine Islands. There has apparently been no legislation whatever on the subject since the American occupation. Act 136, § 56, of the Philippine Commission, referred to in Appellant's Additional Memorandum, is merely that Section of the Philippine Code of Civil Procedure which provides that

"Courts of First Instance shall have original "jurisdiction:

"(a) In all civil actions in which the sub- "ject of litigation is not capable of pecuniary "estimation."

Under this provision the Courts of First Instance in the Philippine Islands have taken jurisdiction of suits for divorce, but the only law on the subject which they can apply is the law of the Partidas.

By the Partidas, condonation is expressly made a defense both to proceedings in the Ecclesiastical Courts (see 4th Partida, Tit. 9, Law 6), and to proceedings in the Lay Courts (see 7th Partida, Tit. 17, Law 8).

It is evident from the entire text of the ancient law that while suits by the wife against the husband were permitted, they were not encouraged, and it is not conceivable that any defense expressly made available to the wife if sued by the husband should not be equally available to the husband if sued by the wife.

The five year bar is expressly provided for by the 7th Partida, Tit. 17, Laws 3 and 7. It is true that the 7th Partida deals primarily with the punishment of offenses by the Lay Courts. It does not, however, expressly prescribe or limit the relief which may be granted by the Lay Courts in proceedings involving matrimonial offenses and it is to be noted that such proceedings may be brought in the Lay Courts by the injured spouse. Moreover, even if it be assumed that jurisdiction to decree a separation was vested exclusively in the Ecclesiastical Courts, nevertheless, it would be both natural and proper for such Courts to apply the same bar as that expressly provided for

in respect to proceedings in the Lay Courts, just as Courts of Equity apply *legal* statutes of limitation.

In any event, these questions, concerning the manner in which the ancient Spanish law governing domestic relations is to be applied in the Philippines, and the length of time sufficient to bar recourse to any remedies provided for thereby, are peculiarly within the judicial knowledge of the highest Court of the Philippine Islands, the members of which are familiar with local social conditions and requirements.

CONCLUSION.

The judgment appealed from should be affirmed.

Respectfully submitted, by leave of Court, this 15th day of November, 1915.

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